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## Women and Rape in Ethnic Conflict and War

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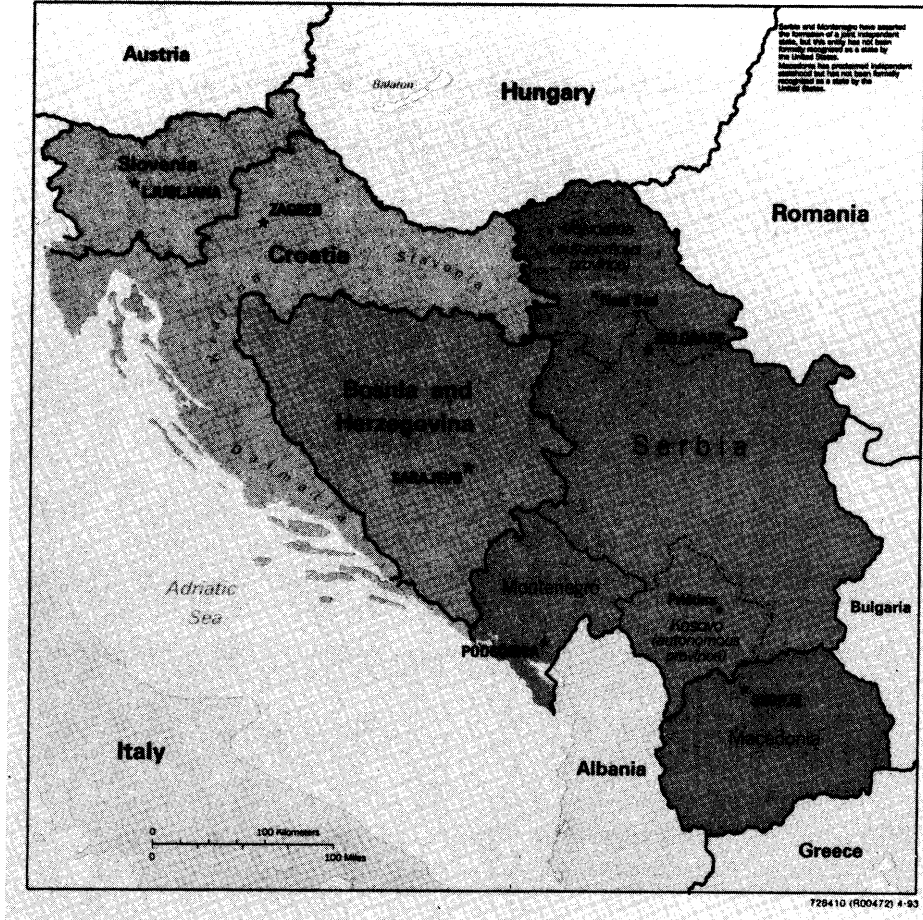
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**Former Yugoslavia**



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## Women and Rape in Ethnic Conflict and War

*a speech by Dorean Marguerite Koenig\**

### Author's Note

[In 1992, a world conference urging the establishment of an international criminal tribunal was held in Sicily, Italy, sponsored by the Association Internationale de Droit Penal (AIDP), the International Institute of Higher Studies in Criminal Sciences (ISISC), the United Nations, and other groups. The years since 1992 have seen the birth of a United Nations War Crimes Tribunal, one of the most significant events of our century.

In the spring of 1994, an American Bar Association (ABA) special task force on future war crimes tribunals was established by Pamela Stuart, Chair of the International Criminal Law Committee of the Criminal Justice Section of the ABA. Under the chair Mark Zaid, I was made chairperson of the group responsible for defining substantive crimes. Our task was to continue the work (now complete) of the ABA Task Force on War Crimes in the Former Yugoslavia and to recommend definitive guidelines. Fortunately, my committee has been able to build upon the work done by Major Walter [Gary] Sharp, with the able assistance of Professor Jordan Paust and others.

A chapter on rape and sexual atrocities has been drawn together from the original drafts. Rapes and other sexual atrocities committed in the former Yugoslavia and Rwanda need not be prosecuted solely as rape, but may be prosecuted as violations of the Geneva Conventions, as genocide, or as a violation of other parts of the War Crimes Statutes.<sup>1</sup>

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\* Professor of Law, Thomas Cooley Law School, Lansing, Michigan, since 1982, Associate Professor since 1978. J.D., University of Detroit, 1967, Ph.D., University of Detroit, 1956. Fulbright Scholar, Finland, 1987. Chairperson, Group Six, Definitional Issues — Substantive War Crimes, American Bar Association Task Force on Proposed Protocols of Evidence and Procedure for Future War Crimes Tribunals (ABA Task Force). Board Member, American Section, Association Internationale de Droit Penal (AIDP); AIDP Representative to the United Nations Fourth World Conference on Women.

1. The views contained herein are my own and not necessarily those of the committee, which has not yet completed its work.

This was the theme of a talk I gave on November 6, 1994, at the University of Melbourne, Australia, and earlier in October at Michigan State University, which, with a few additions, is reproduced here.

As chairperson of the Sixth Group of the ABA Task Force, I was able to draw Kelly Askin, my former student, into the committee work as Junior Chairperson. Ms. Askin, an American lawyer, is currently obtaining her Ph.D. in law at the University of Melbourne, Australia, where her dissertation is on war crimes against women. I am deeply indebted to Kelly for sharing her work with me and for our many discussions which gave rise to this speech. At Melbourne, Kelly is active in working with refugees from the territory of the former Yugoslavia. As a result, I was invited by Professor Timothy L.H. McCormack, Senior Lecturer in Law at the University of Melbourne, to participate in a round table discussion of the War Crimes Tribunal and War Crimes Investigations. The round table was sponsored by the International Law Interest Group of the Faculty of Law of the University of Melbourne, as well as the Australian Committee of Investigation into War Crimes (ACIWC). The following individuals also participated in the round table: Jane Gronow<sup>2</sup>, Program and Organizational Manager of the Villa Isida in Zagreb, Croatia, a women's center which provides medical, psychological and humanitarian assistance to female refugees traumatized by the war; Helen Durham, Ph.D. candidate in International Law; and Georgina McEnroe. The round table was chaired by lecturer in law, Penelope Mathew.

In December, 1994, I was invited to a second conference in Sicily focusing on international criminal justice, held under the auspices of the ISISC and the AIDP, as well as the Secretary General of the Council of Europe in cooperation with the United Nations Crime Prevention and Criminal Justice Branch, the World Federalist Association, Parliamentarians for Global Action and other groups. This conference, like the first, was organized by Professor Cherif Bassiouni. The conference was attended by the Chief Prosecutor of the War Crimes Tribunal, Justice Richard Goldstone, well known for his work on human rights in South Africa, and by the Chief Assistant Prosecutor of the War Crimes Tribunal, Graham Blewitt of Australia.

As a Board member of the American Section of the AIDP<sup>3</sup>, I, along with Kelly Askin, have been named to represent the AIDP at the United Nations Fourth Conference on Women to be held in Beijing, China in 1995.]

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2. Jane Gronow was sponsored by Austcare, an Australian humanitarian group.

3. The AIDP is a world-wide association of criminal law specialists, which has consultative status with the United Nations, the Council of Europe, and UNESCO.

## WOMEN AND RAPE IN ETHNIC CONFLICT AND WAR

Who gets to tell the story and whose story counts as true determines whether rape exists. Lynn Higgins and Brenda Silver, in their book *Rape and Representation*, find that rape and the threat of rape are a major force in the subjugation of women. They write:

The question then becomes how undecidability, at least in the courts, may lead to the disappearance of rape from the social text.<sup>4</sup>

Rape and violence aimed against women and children in the conflict in the former Yugoslavia have been reported for nearly three years, often with graphic vicious detail. The world has heard of mothers and fathers being forced to watch their child-daughters raped and killed, of forced pregnancies, of rape camps, of humiliation, gross physical abuse, degradation and death imposed because the victim had been raped. As Kelly Askin describes in her doctoral dissertation, citing Wing & Merchan<sup>5</sup>, the Muslim victims of rape are twice condemned. A non-Muslim child is not considered to be Muslim. Chastity is essential to family honor and a raped victim brings shame and disgrace to the entire family. As a story in the *New York Times Magazine* recently stated:

Castration . . . appears, together with rape, to be part of a pattern of psychological pressure that has played an especially insidious role in ethnic cleansing.<sup>6</sup>

There is no clear answer as to whether the rape crimes committed in the former Yugoslavia will ever be addressed by the United Nations War Crimes Tribunal or any national court. History has shown that rape, even aggravated rape, in the context of war has been little prosecuted or punished. This is particularly true when the main perpetrators are political leaders whose cooperation is necessary for reaching a peace accord.

Catharine MacKinnon has written eloquently about the rapes which have taken place and which continue to take place in the former Yugoslavia:

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4. LYNN HIGGINS & BRENDA SILVER, *RAPE AND REPRESENTATION* 2 (1991).

5. Adrien Katherine Wing & Sylke Merchan, *Rape, Ethnicity, and Culture: Spirit Inquiry from Bosnia to Black America*, 25 COLUM. HUM. RTS. L. REV. 1 (1993) (stating, "A child born from rape is . . . viewed by many as a 'polluted' child who cannot carry on the family line. Furthermore, the victim bearing the 'polluted' child is also viewed as polluted because of the rape, as well as being an undesirable candidate to fulfill a wife's duty to bear children to carry on the family line.").

6. Melinda Crane-Engel, *Germany vs. Genocide*, N.Y. TIMES, Oct. 30, 1994, (Magazine), at 59.

This is ethnic rape as an official policy of war: . . . rape under orders; not out of control, under control. It is rape unto death, rape as massacre, rape to kill or to make the victims wish they were dead.<sup>7</sup>

There has been a call to create a specific war crime of rape, since rape has not been specifically singled out as a war crime. The United Nations Statute for War Crimes Committed in the Former Yugoslavia lists rape only once, and only under the section involving Crimes Against Humanity, where additional factors need to be proven. Rape, prosecuted under that section, requires proof that the act was part of a widespread or systematic attack against a civilian population on national, political, ethnic, racial or religious grounds.<sup>8</sup>

The work currently in progress of the Sixth Group of the ABA Task Force, (of which I am the chairperson), is centered on presenting a list of crimes and their elements, which are drawn, in part, from the United Nations Statute for War Crimes Committed in the Former Yugoslavia. This is being done both to assist the War Crimes Tribunal in its current work as well as laying a framework for future war crimes tribunals.

Little work has been done to define the crimes which are encompassed by the United Nations Statute for Crimes Committed in the Former Yugoslavia, and there exists no analysis as to whether those existing statutory crimes, other than rape as a crime against humanity, can be used to prosecute the kinds of rape which have occurred in the Bosnian war. I believe that there are many existing avenues for the prosecution of rape under the United Nations War Crimes Statute, in addition to rape as a crime against humanity. This should not be forgotten. The prosecution of the perpetrators of the rape of women and children in Bosnia-Herzegovina and earlier in Croatia is not only possible but must be demanded under all of the applicable crimes delineated within the United Nations War Crimes Statute.

In this talk, I will first discuss the creation of the War Crimes Tribunal, and its current status and the impending first prosecutions. Next, I will discuss the War Crimes Statute — that is, the types of crimes which currently can be prosecuted under the Statute. In this regard, I will list the various substantive ways in which rape currently can be prosecuted under the UN Statute as well as the international instruments upon which these crimes are based. Lastly, I will discuss the future of prosecution of rape and other crimes against women.

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7. CATHARINE A. MACKINNON, ON HUMAN RIGHTS: THE OXFORD AMNESTY LECTURES 89-90 (Stephen Shute & Susan Hurley eds., 1993).

8. See *infra* text accompanying note 34.

At the time of its break-up, the former Yugoslavia had been given provisional status in the Council of Europe and was about to become a member. Prior to the outbreak of war, the unified country was a signatory to the major human rights treaties. Therefore, the principle of *nullum crimen sine lege*, that there is no crime without a pre-existing law, is unavailing. The repeated warnings of the United Nations Security Council reflect this message. On July 13, 1992, the Security Council reaffirmed that there was individual responsibility for the violations of international humanitarian law occurring in the former Yugoslavia, and that all persons there were bound to comply with the obligations required under international humanitarian law.<sup>9</sup> On April 17, 1993, the Security Council again condemned all violations of international humanitarian law, particularly condemning "the practice of 'ethnic cleansing' and the massive, organized and systematic detention and rape of women, and reaffirmed that those who commit or have committed or order or have ordered the commission of such acts will be held individually responsible. . . ."<sup>10</sup> On February 22, 1993, the United Nations Security Council by resolution established a tribunal to investigate, prosecute and punish those responsible for such atrocities.<sup>11</sup> The Security Council, again by resolution, next approved a criminal law statute submitted by the Secretary-General of the United Nations.<sup>12</sup>

The Security Council then compiled a list of twenty-three judges, from which the General Assembly elected eleven in ten rounds of balloting. The Court is situated in the Hague, where the judges first met in November, 1993.<sup>13</sup> There are two women judges on the court: Judge Elizabeth Odio-Benito, Costa Rican Justice Minister, elected vice-president, and Judge

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9. S. Res. 764, U.N. SCOR, 47th Sess., 3093d mtg., at 3, U.N. Doc. S/RES/764 (1992).

10. S. Res. 820, U.N. SCOR, 48th Sess., 3200th mtg., at 2, U.N. Doc. S/RES/820 (1993). See also, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, U.N. SCOR, 48th Sess., U.N. Doc. S/25704 (1993), adopted by the Security Council on May 25, 1993.

11. S. Res. 808, U.N. SCOR, 48th Sess., 3175th mtg., at 1, U.N. Doc. S/RES/808 (1993).

12. A report containing the Statute [hereinafter "*Statute*"] was submitted within sixty days by the Secretary-General, as requested in resolution 808 (1993). See S. Res. 808, U.N. SCOR, 48th Sess., 3175th mtg., U.N. Doc. S/RES/808 (1993). This was unanimously adopted in resolution 827 (1993) of 25 May, 1993. (For history see *First Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991*, [hereinafter "*First Report*"], submitted by the President of the International Tribunal in accordance with Article 34 of its statute. See G.A. A/49/342, S/1994/1007/29.)

13. Jeri Laber & Ivana Nizich, *The War Crimes Tribunal For the Former Yugoslavia: Problems and Prospects*, 18 THE FLETCHER FORUM OF WORLD AFFAIRS, No. 2, 7 n.2 (1994).

Gabrielle Kirk McDonald, a United States Federal Court Judge for nearly ten years, and a Professor of Law and former civil rights lawyer.<sup>14</sup>

Antonio Cassese, President of the Tribunal, has stated: "Of course we will not have a sort of Nuremberg trial, only because we don't have all of the accused at hand."<sup>15</sup> After much delay, a chief prosecutor was selected. He is Justice Richard Goldstone of the Supreme Court of South Africa, well known for his humanitarian work in his home country.<sup>16</sup> Graham Blewitt of Australia is the Chief Deputy Prosecutor. The Holland parliament has passed national legislation granting the War Crimes Tribunal jurisdiction over a section of prison area. The area of the prison for War Crimes defendants is now the territory of the United Nations.

While there are those who believe that the court is an empty promise of justice, others believe that it is a bold new approach to punish those who engage in gross violations of human rights. Even if a perpetrator does not become available for trial, once indictments are handed down, those who have ordered and those who have carried out these illegal and horrific orders will be world outlaws, unsafe from punishment and retribution anywhere except perhaps in their own small state. After indictments are handed down, a warrant will be sent to the country where the defendant is found. If the country does not hand over the defendant — which it is required to do — then the prosecutor will present the evidence to the judges for a judicial determination that there is a basis for the warrant. After the hearing, if sufficient evidence appears to underlie the warrant, a worldwide warrant will be issued, making the defendant subject to arrest anywhere he might be found. There will never be peace unless there is some justice.

According to a story in the *New York Times Magazine*,<sup>17</sup> the tribunal has applied for jurisdiction over its first case involving defendant Dusko Tadić, a former prison guard at the Omarska prison camp, who is currently being held in Germany. There are 400,000 refugees from the former Yugoslavia in Germany. Last October Husein Besic, the owner of the cafe Bosna in Hamburg, heard that Tadić, a Bosnian Serb, was in Munich, where he had fled to avoid being drafted. Tadić had been a notorious

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14. *First Report*, *supra* note 12, at 52. Originally a third woman, Judge Germain Le Foyer de Costil of France, was elected to the court but had to resign because of ill health.

15. Maud S. Beelman, *U.N. Tribunal on Bosnian War Crimes is Stalled No Prosecutors, No Investigators After a Full Year*, SEATTLE TIMES, Apr. 24, 1994, at A21.

16. *First Report*, *supra* note 12, at 54: "Mr. Goldstone was a barrister at the Johannesburg Bar from 1963 to 1980, before being appointed as a Judge of the Transvaal Supreme Court. In 1989, he was appointed to the Appellate Division of the Supreme Court of South Africa. Since 1991, Mr. Goldstone has been Chairman of the Commission of Inquiry regarding the Prevention of Public Violence and Intimidation." Mr. Goldstone was recently elevated to South Africa's Constitutional Court.

17. Crane-Engel, *supra* note 6, at 56-59.



guard, allegedly responsible for the death of at least seven inmates in 1992 and for the beatings of many others at the Omarska prison camp. (Omarska had survivors principally because it was discovered by the international press in August, 1992.<sup>18</sup>) Tadić is also said to have ordered the castration of three prisoners.

How will the transfer from Germany to the Hague take place? The Rules of Procedure were adopted by the Tribunal in February, 1994. Rules 55 through 58 are relevant: A warrant of arrest signed by a War Crimes Tribunal judge, a copy of the indictment and a statement of the rights of the accused (which include the right to remain silent and to be cautioned that any statement he makes shall be recorded and may be used as evidence) will be transmitted to the national authorities in Germany "with instructions that at the time of arrest the indictment and the statement of rights be read to him in a language he understands."<sup>19</sup> After this occurs, the transfer to the Hague is arranged between the Registrar and officials.<sup>20</sup> Rule 58 indicates the primacy of the War Crimes Tribunal: "The obligations laid down in Article 29 of the Statute shall prevail over any legal impediment to the surrender or transfer of the accused to the Tribunal which may exist under the national law or extradition treaties of the State concerned."<sup>21</sup> The rules refer to Article 29<sup>22</sup> of the Statute which mandates cooperation with the International Tribunal.<sup>23</sup> As can be readily seen, this process gives the international court sovereignty over existing

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18. On August 2, 1992, Roy Gutman of *Newsday* reported Omarska based upon interviews with two survivors, calling Omarska a "concentration camp," and British Independent Television News broadcast the first pictures on August 6, 1992. See an account by Steve Coll, *In the Shadow of the Holocaust*, WASH. POST, Sept. 25, 1994, at 23 (calling the West's failure to take sides and more incisively intervene, "tawdry").

19. Rule 55[A] & [B], *Rules of Procedure and Evidence*, International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991, 2nd Sess., at 29-30, U.N. Doc. IT/32 (1994).

20. Rule 57, *Rules of Procedure and Evidence*, International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991, 2nd Sess., at 30, U.N. Doc. IT/32 (1994).

21. Rule 58, *Rules of Procedure and Evidence*, International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991, 2nd Sess., at 30, U.N. Doc. IT/32 (1994).

22. *Statute*, *supra* note 12, at art. 29. The accompanying paragraphs of this article state at paragraph 125: ". . . [T]his means that all States would be under an obligation to cooperate with the International Tribunal and to assist it in all stages of the proceedings to ensure compliance with requests for assistance in the gathering of evidence, hearing of witnesses, suspects and experts, identification and location of persons and the service of documents."

23. Article 29 of the *Statute* states: "States shall cooperate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law." *Id.*

separate states. Germany is in the process of enacting a law which will allow the transfer to take place.

The prosecution of an assaultive, gratuitously violent prison guard, however, does little to answer the question of how such atrocities can happen. Judge Hanne Sophie Greve of Norway, who has drafted a study for the United Nations War Crimes Tribunal, recently said:

If you look at any situation where things go really wrong, isn't it always like this? You need someone to do an ugly job and you look for the criminals, the half-mad or the very young. You give them influence, power, money and then you have them; they will do as they're told.<sup>24</sup>

Who then are the culprits? The Statute at Article 7 states that anyone "who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime (under the statute) shall be individually liable for the crime."<sup>25</sup> Whether the tribunal will be able to work up the ladder of responsibility remains to be seen, especially in light of the expected amnesty requests that will inevitably arise during negotiations to end hostilities.

But the machinery exists within the War Crimes Statute to punish those who have aided and abetted these crimes. Chief Prosecutor Goldstone has stated that he is determined to prosecute those persons who conceived of the policy of ethnic cleansing, who are most guilty, and to go as high as the evidence permits, without regard to political consequences.<sup>26</sup> One difficulty is that budget and bureaucracy issues may be used by others as a means to political ends, which can be done without incurring liability. The political will must be found.

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24. Crane-Engel, *supra* note 6, at 59.

25. *Statute, supra* note 12, at art. 7. The accompanying commentary at paragraphs 55 and 56 state: "The Statute should, therefore, contain provisions which specify that a plea of head of State immunity or that an act was committed in the official capacity of the accused will not constitute a defence, nor will it mitigate punishment. A person in a position of superior authority should, therefore, be held individually responsible for giving the unlawful order to commit a crimes under the present statute. But he should also be held responsible for failure to prevent a crime or to deter the unlawful behavior of his subordinates. This imputed responsibility or criminal negligence is engaged if the person in superior authority knew or had reason to know that his subordinates were about to commit or had committed crimes and yet failed to take the necessary and reasonable steps to prevent or repress the commission of such crimes or to punish those who had committed them."

26. Justice Richard Goldstone, Speech at the International Experts Conference on International Criminal Justice: Historic and Contemporary Perspectives (Dec. 5, 1994). The policy of Justice Goldstone's office is that the people who conceived of the policy of ethnic cleansing are more guilty than the persons who committed the acts. *Id.*

### The War Crimes Statute

I will next turn to the Statute and indicate how it can be used to prosecute rape, especially rape as it has been practiced as a policy in the former Yugoslavia. There are four listed bases for prosecution under the Tribunal's Statute, namely: (1) genocide; (2) grave breaches of the 1949 Geneva Conventions; (3) violations of the laws or customs of war; and (4) crimes against humanity. Of these, as I stated, crimes against humanity is the only section which explicitly mentions the crime of rape.

#### Genocide

I will begin with genocide. Bosnia-Herzegovina brought a case against Serbia and Montenegro before the International Court of Justice at the Hague to prevent the crime of genocide in Bosnia-Herzegovina. In this lawsuit, it was argued that the rapes in Bosnia are being committed with the intent to destroy, in whole or in part, the Muslim group as such. There is much evidence to that effect. The elements of genocide are derived from the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. As Professors Timothy McCormack and Gerry Simpson state in the Criminal Law Forum, Article II of the Genocide Convention is "now considered to be the expression of international law on the subject."<sup>27</sup> What then are the elements of genocide? The mens rea of genocide is that the required act (discussed below) be committed with the intent to take part in a plan to destroy the group in whole or in part. The actus reus, or act required, can be one of any listed in the Genocide Convention, i.e.,:

1. Wilful killing, or
2. Causing serious bodily or mental harm, or
3. Deliberately inflicting conditions of life calculated to bring about the physical destruction of the group in whole or in part,  
or
4. Imposing measures intended to prevent births within the group,  
or
5. Forcibly transferring children of the group to another group.<sup>28</sup>

Any of these acts if proven to be done intending to take part in a plan to destroy an ethnic group is genocide.<sup>29</sup> (The intent can also be to

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27. Timothy L.H. McCormack & Gerry J. Simpson, *The International Law Commission's Draft Code of Crimes against the Peace and Security of Mankind: An Appraisal of the Substantive Provisions*, 5 CRIM. L.F. 1, 13-14 (1994), citing RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 cmt. d (1987).

28. Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide, adopted Dec. 9, 1948, 78 U.N.T.S. 277.

29. *Id.*

destroy a national, racial or religious group, as well as an ethnic group.<sup>30)</sup> Thus, if the acts of rape committed can be shown to have caused serious bodily or mental harm, created conditions of life calculated to bring about the physical destruction of the group in whole or in part, or involved a wilful killing, and if acts of rape were committed with the intent to bring about the destruction of the group in whole or in part, then the crime of genocide is proven.

### Geneva Conventions

Secondly, grave breaches of the four Geneva Conventions of 1949 may be prosecuted by the War Crimes Tribunal, and the grave breaches are listed in each of the Conventions. Under each of the Geneva Conventions, the listed grave breaches may encompass the crime of rape if aggravated conditions exist which constitute a grave breach. The listed grave breaches include:

1. Wilful killing, or
2. Torture, or
3. Inhumane Treatment, or
4. Wilfully Causing Great Suffering, or
5. Causing serious injury to body or health, or
6. Unlawful confinement of a civilian, . . .<sup>31</sup>

In addition, the person injured must have been protected under one or more of the 1949 Geneva Conventions. Under the facts of rape presented in the press, this would ordinarily include the Geneva Convention Relative to the Protection of Civilian Persons in Time of War.<sup>32</sup> This Convention protects civilians in occupied territories who are not of the nationality of the occupying state. Other Geneva Conventions similarly protect war victims, the wounded and the sick, medical personnel, chaplains, prisoners of war and shipwrecked persons.<sup>33</sup> Several commentators have noted that

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30. *Id.*

31. There are other grave breaches which would ordinarily not be applicable to rape crimes. These include: extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly, compelling service in the forces of a hostile power, wilful deprivation of the rights of fair and regular trial, unlawful deportation or transfer or confinement, and taking of hostages. Identical grave breaches are found in Article 147 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Article 50 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Article 51 of the Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, and Article 130 of the Geneva Convention Relative to the Treatment of Prisoners of War.

32. 6 U.S.T. 3517, 1949.

33. Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 28.

neither Protocol I nor Protocol II, which specifically mention the crime of rape, are included within the Statute. Because these Protocols have been omitted, in view of the history of the Tribunal as an ad hoc court as well as the United Nations Security Council's concern with rape, it would be reasonable to conclude that the aggravated rapes which have been committed, if constituting also a grave breach of the Geneva Conventions, may be prosecuted as one of the listed grave breaches.

### Laws or Customs of War

The next specific section of the Statute lists violations of the laws or customs of war. This article lists certain crimes but specifically states that the list is not exhaustive; rape is not included in the list. The Working Group on a Draft Statute for An International Criminal Court refers in their commentary to Article 20(c) of the Draft Statute for an International Criminal Court to "serious violations of the laws and customs applicable in armed conflict."<sup>34</sup> The report of the International Law Commission notes that the Yugoslavian Statute has two articles, No. 2 covering grave breaches of the Geneva Conventions of 1949 and No. 3 dealing with violations of the laws or customs of war. The report then compares Article 3 of the Yugoslavian Statute with Article 22 of the Draft Statute for an International Criminal Court.<sup>35</sup> The Draft Statute defines an exceptionally serious war crime, while Article 3 of the Yugoslavian Statute states merely that the article is not limited to the listed crimes. It therefore could be concluded that Article 3 includes the exceptionally serious war crimes listed in the Draft Statute. The report states: "The Commission shares the widespread view that there exists the category of war crimes under customary international law. That category overlaps with but is not identical to the category of grave breaches of the 1949 Geneva Conventions and Additional Protocol I of 1977."<sup>36</sup> Article 22 includes in its definition of an exceptionally serious war crime: "(a) acts of inhumanity, cruelty or barbarity directed against the life, dignity or physical or mental integrity of persons."<sup>37</sup> Rape, especially as it has been practiced in this conflict, may be construed as a violation of the laws or customs of war (under the examples given in the Report of the International Law Commission), if it constitutes inhumanity, cruelty or barbarity.

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34. *Report of the International Law Commission on the Work of its Forty-Sixth Session*, U.N. GAOR, 49th Sess., Supp. No. 10, at 70, U.N. Doc. A/49/10 (1994).

35. *Id.* at 74.

36. *Id.* at 73.

37. *Id.* at 74.

### Crimes Against Humanity

The last section of the War Crimes Statute is crimes against humanity. Crimes against humanity are serious offenses traditionally recognized only if directed against persons as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds.<sup>38</sup> Isolated offenses are not a crime against humanity. The statutory language of Article five also states that the crime must be "committed in armed conflict."<sup>39</sup> This is the only section that specifically lists rape. Other specific crimes found in crimes against humanity, which could be included in a prosecution of rape, if the facts fit that crime, are enslavement, imprisonment, torture and mutilation, and other forms of sexual assault, including enforced prostitution.<sup>40</sup> It also specifically includes persecutions on political, racial and religious grounds, and other inhumane acts.

### Addendum

The current Statute for the War Crimes Tribunal contains ample provisions under which the crimes of rape and enforced prostitution can be prosecuted. They may constitute, in addition to the crime of rape, the crimes of torture, inhumane treatment, enslavement, imprisonment, and mutilation. That they also constitute rape should not prevent their continued prosecution under the existing statute. Having had the will to create the War Crimes Tribunal for these horrific crimes, the prosecutors should now indict under multiple sections of the statute. If the facts include rape and sexual torture and satisfy the elements of other crimes, the defendants should be prosecuted under indictments which include not only rape but also whatever other crimes are established under the statute.

Justice Richard Goldstone, the Chief Prosecutor of the Yugoslavian (and Rwandan) Tribunals, has indicated that it is his intention to prosecute under Sections two through four of the Statute as well as Article five.<sup>41</sup>

However, the future of the War Crimes Tribunal remains in doubt. If the tribunal succumbs to the enticement of trading trials for peace, then there will be neither peace nor justice. As Professor Diane Orentlicher of

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38. *Id.* at 76. "The hallmarks of such crimes lie in their large-scale and systematic nature."

39. *Statute, supra* note 12, Article 5.

40. *Id.*

41. Justice Richard Goldstone, Speech at the International Experts Conference on International Criminal Justice: Historic and Contemporary Perspectives (Dec. 6, 1994). Justice Goldstone indicated his willingness to prosecute sexual assault under whatever sections of the statute can be applied, such as genocide, torture or the destruction of cultural property, and so forth.

American University has stated: “[a]mnesty is in conflict with legal norms.”<sup>42</sup> The practice has been one of impunity in punishing massive crimes. But new norms do come to bear. The idea of individual accountability resonates.

The creation of the War Crimes Tribunal signals an impressive turning point for international human rights. This view is shared by Judge Antonio Cassese, President of the International Criminal Tribunal, who recently stated:

[I]nternational standards on respect for human dignity in armed conflict. . . will no longer be impervious to international judicial enforcement.<sup>43</sup>

So, the hope is that international trials will take place, and that the International War Crimes Tribunal will become a part of the retribution to be paid by those who violate human rights and norms. The Tribunal must, of course, be fair and this brings with it the attendant costs of services for victims and the provision of attorneys and defense mechanisms for defendants. No one has ever said that justice is cheap. Yet the only alternative is that injustice goes unnoticed and that the strongest can victimize the weakest. As noted recently by Cherif Bassiouni, chairperson of the United Nations Committee investigating war crimes committed in the former Yugoslavia:

Governments are still playing the 19th-century game of Realpolitik, and people today throughout the world want to have a moral-ethical basis in international relations.<sup>44</sup>

The Tribunal carries that hope with it.

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42. Professor Diane Orentlicher, Talk at International Experts Conference on International Criminal Justice: Historic and Contemporary Perspectives (Dec. 7, 1994).

43. Judge Antonio Cassese, Address to the General Assembly of the United Nations (Nov. 14, 1994), in *International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia Since 1991*, U.N. Doc. IT/87 (1994).

44. Cherif Bassiouni, *Opening the Docket: Trials of a War Tribunal*, CHRISTIAN SCIENCE MONITOR, Nov. 16, 1994, at 7.

